

PUBLIC EMPLOYMENT RELATIONS BOARD
FOR THE STATE OF DELAWARE

AMERICAN FEDERATION OF STATE, COUNTY	:	
AND MUNICIPAL EMPLOYEES, COUNCIL 81,	:	
LOCAL 218,	:	
	:	<u>ULP No. 09-11-720</u>
Charging Party,	:	
	:	
v.	:	Probable Cause Determination
	:	
RED CLAY CONSOLIDATED SCHOOL DISTRICT,	:	and Order of Dismissal
	:	
Respondent.	:	

BACKGROUND

The Red Clay Consolidated School District ("District") is a public employer within the meaning of §1302(p) of the Public Employment Relations Act ("PERA"), 19 Del.C. Chapter 13 (1994).

The American Federation of State, County and Municipal Employees, Council 81, Local 218 ("AFSCME") is the exclusive representative of custodial employees of the District for purposes of collective bargaining (as defined in DOL Case 141), pursuant to §1302(j) of PERA.

AFSCME and the District are parties to a collective bargaining agreement with a term of July 1, 2007 – June 30, 2011, which includes a negotiated grievance procedure in Article 4.

On November 17, 2009, AFSCME filed an unfair labor practice charge with the Public Employment Relations Board ("PERB") alleging conduct by the District in violation of Section 1307 (a)(5) and (a)(6) of the PERA, which provide:

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
 - (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.
 - (6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

The Charge alleges that AFSCME and the District participated in the arbitration of a grievance protesting the discharge of a bargaining unit employee. The Arbitrator issued his decision on or about August 28, 2009, in which he ruled that while the grievant's conduct warranted some discipline, discharge was an overly severe response to that conduct. The Arbitrator ordered that the grievant be "reinstated and made whole (including pay, benefits and seniority), except for a period of a one-week suspension." The grievant was subsequently reinstated, but assigned to a different shift and work location from that which he held prior to his termination.

On December 11, 2009, the District filed its Answer, in which it does not dispute the underlying factual allegations of the Charge. Under Affirmative Defenses and New Matter, the District alleges that the Arbitrator found that the grievant had engaged in the conduct for which he was disciplined. Because of the nature of the incident, the District determined that the grievant should not continue to work in an elementary school and reassigned him to an adult school. In so doing, the District properly exercised its management rights as set forth in Article 6.15 of the negotiated collective bargaining agreement. The District further alleged that Article 16.1 specifically waives any requirement that the parties bargain over any subject during the term of the collective bargaining agreement. The District moved the Charge be dismissed in its entirety, with prejudice.

On or about February 9, 2010, AFSCME filed its Response to New Matter in which it denied the District's arguments.

This Probable Cause Determination is based upon a review of the pleadings.

DISCUSSION

The Rules and Regulations of the Delaware PERB require that upon completion of the pleadings in an unfair labor practice proceeding, a determination shall be issued as to whether those pleadings establish probable cause to believe the conduct or incidents alleged may have violated the Public Employment Relations Act, 19 Del.C. Chapter 13. *DE PERB Rule 5.6*. For the purpose of this review, factual disputes established by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing what may prove to be a valid charge without the benefit of receiving evidence concerning that factual dispute. *Richard Flowers v. State of Delaware, Department of Transportation, Delaware Transit Corporation*, Probable Cause Determination, ULP No. 04-10-453,V PERB 3179 (2004).

There is no dispute that the grievance procedure is a mandatory subject of bargaining and that the District and AFSCME have negotiated a grievance procedure and included it in their collective bargaining agreement in Article 4.

The Public Employment Relations Board has consistently and repeatedly held that resolution of disputes which arise concerning application or interpretation of the terms of a collective bargaining agreement, i.e., a grievance, are reserved for resolution through the parties' negotiated grievance and arbitration procedures. PERB is not a substitute for the grievance procedure and its jurisdiction is limited to consideration of charges that the statute has been violated and that an unfair labor practice (as defined at 19 Del.C. §1307) has been committed.

There is nothing in this Charge which supports the conclusion that the District has failed or refused to abide by the negotiated grievance procedure. It is clear that the grievance was processed through the grievance procedure, up to arbitration, and that an award was issued at the conclusion of that process. In fact, in his decision the Arbitrator retained jurisdiction over the case, “to the extent that the parties have any disputes regarding the implementation or interpretation of the remedy.”

AFSCME’s Charge raises a question concerning the implementation and/or interpretation of the remedy portion of the Arbitrator’s award. Whether the terms of the grievant’s reinstatement comply with the Arbitrator’s award does not rise to the level of an unfair labor practice, is subject to resolution through the negotiated grievance and arbitration procedure, and should be submitted to the Arbitrator for clarification consistent with the terms of the award.

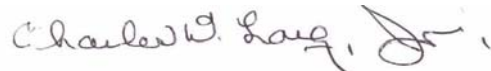
DETERMINATION

Considered in a light most favorable to the Charging Party, the pleadings fail to establish probable cause to believe that an unfair labor practice may have occurred.

Wherefore, the Charge is hereby dismissed.

IT IS SO ORDERED.

DATE: June 21, 2010



Charles D. Long, Jr.
Hearing Officer
Del. Public Employment Relations Bd.